

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)
)
HIGHLANDS SERVICES, LLC)
)
For Declaratory Ruling.)
_____)

DOCKET NO. 2006-0485

DECISION AND ORDER NO. 23239

DIV. OF CONSUMER ADVOCACY
DEPT. OF COMMERCE AND
CONSUMER AFFAIRS
STATE OF HAWAII

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Karen Higashi.
Chief Clerk of the Commission

ATTEST: A True Copy
KAREN HIGASHI
Chief Clerk, Public Utilities
Commission, State of Hawaii.

Karen Higashi.

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

In the Matter of the Petition of)	
HIGHLANDS SERVICES, LLC)	Docket No. 2006-0485
For Declaratory Ruling.)	Decision and Order No. 23239
_____)	

DECISION AND ORDER

By this Decision and Order, the commission declares that Highlands Water Association (the "Water Association"), which will own and operate Petitioner HIGHLANDS SERVICES, LLC's ("Petitioner") private water system, the Maui Highlands Water System ("Water System"), is not a public utility as defined by Hawaii Revised Statutes ("HRS") § 269-1. Accordingly, the Water Association, as it is described by Petitioner, would not be subject to the jurisdiction of the commission, and, thus, would not require a certificate of public convenience and necessity ("CPCN"), pursuant to HRS § 269-7.5, to provide the proposed water service described by Petitioner.

I.

Background

A.

The Petition

On December 19, 2006, Petitioner filed a petition ("Petition")¹ requesting that "a declaratory order be issued

¹Petitioner served copies of the Petition on the DIVISION OF CONSUMER ADVOCACY, DEPARTMENT OF COMMERCE AND CONSUMER AFFAIRS

stating that since its Water System will only serve members of the Water Association, the Water System is not a public utility and is not subject to the commission's jurisdiction."²

As described in its Petition, Petitioner is proposing to develop and construct the Water System to serve the new Haleakala Greens Subdivision in Kihei, Maui, Hawaii ("Haleakala Greens"), which will be comprised of 152 units in the Na Hokulani Golf Villas Condominium ("Na Hokulani") and 68 units in the Nu'u Aina Estates Condominium ("Nu'u Aina").³ The Water System will also provide excess water to the Haleakala Ranch Company (the "Ranch") and other entities in Kihei.

The Water System will be developed and operated on land owned by the Ranch. Petitioner represents that the Ranch, as the owner of the ground water, conveyed to Petitioner the right and license to draw ground water for the potable water use of Haleakala Greens in the aggregate amount of net 99,000 gallons per day, subject to adjustment. The Ranch, according to Petitioner, will have the permanent, perpetual right to all water that may be pumped in excess of Haleakala Greens' allocation

("Consumer Advocate"), an ex-officio party to all proceedings before the commission. See HRS § 269-51; Hawaii Administrative Rules § 6-61-62.

²See Petition at 7.

³Na Hokulani is being developed by Signature Development of Hawaii, LLC ("Signature Development") while Maui Highlands Properties LLC ("Maui Highlands") is the developer of Nu'u Aina. Signature Development and Maui Highlands formed Petitioner to develop and construct the Water System, a private single common potable water system, to serve both developments. See Petition at 3 n.1.

("Excess Water").⁴ To gain access to the Excess Water, the Ranch may, at its sole cost and expense, connect its own water system to Petitioner's Water System.

Once the condominium units in Haleakala Greens are built and sold, the Water System will be "turned over" to the Water Association, a community membership-owned association. According to Petitioner: (1) ownership of property in Haleakala Greens requires membership in the Water Association; (2) Water Association membership will automatically be transferred to the new owner if and when the property is conveyed; (3) the Ranch will be a member of the Water Association; and (4) if the Ranch, in the future, should offer any of the Excess Water to any other entities, these entities will automatically be members of the Water Association. As a result, the Water System will be owned and operated by the Water Association, a non-profit corporation, and everyone served by the Water System will be members of the Water Association, including all property owners in Haleakala Greens, the Ranch, and any future entities that may be offered Excess Water. As members of the Water Association, Petitioner states that "all the entities that will receive water from the Water System will have the right to vote, have control over the decisions made by the Water Association, and have the right to [provide] input into the

⁴Petitioner represents that the Ranch will be responsible for any incremental costs of constructing the Water System beyond the design and costs needed to develop the Water System to deliver Haleakala Greens' maximum water allocation; and is only allowed to draw Excess Water at the Water System's wells in raw, untreated form, unless the Ranch participates in Petitioner's costs associated with storage, treatment, and/or transmission facilities.

rates and conditions of service by the Water Association."⁵ Petitioner contends that the Water System will only serve members of the Water Association and that at no time will water from the system be supplied to "the public, as a class, or to any limited portion of it."⁶ As such, Petitioner asserts that under existing law, it is not subject to commission jurisdiction and thus is not required to submit an application for a CPCN for its Water System.

B.

Consumer Advocate's Position

On January 23, 2007, the Consumer Advocate filed its Statement of Position ("CA's Statement of Position") stating that Petitioner "and the proposed subsequent membership-owned entity, the . . . [Water Association], should not be considered a public utility pursuant to [the] definition set forth in . . . [HRS] § 269-1."⁷ The Consumer Advocate's position is based on its finding that the Water System will not operate to serve the public under the test established by the Hawaii Supreme Court⁸ and the commission in past decisions. The Consumer Advocate states that Petitioner will not be providing water service directly or indirectly for public use since Petitioner owns the subdivision

⁵See Petition at 6-7.

⁶Id. at 7.

⁷See CA's Statement of Position at 1.

⁸The Consumer Advocate references the Hawaii Supreme Court's decision in In re Wind Power Pacific Investors-III, 67 Haw. 342, 686 P.2d 831 (1984) ("Wind Power").

to be served by the Water System and "because all subsequent condominium purchasers will be required to become owner-members of the [Water] Association who will own and operate the Water System."⁹ In short, the Consumer Advocate agrees with Petitioner that the Water Association would not be a public utility since "the owner-members of the [Water] Association will [have] control of the Water System."¹⁰

II.

Discussion

Under HRS § 269-7.5, a public utility, as defined in HRS § 269-1, must obtain a CPCN from the commission prior to commencing its business. HRS § 269-1 defines a "public utility" as:

. . . every person who may own, control, operate, or manage as owner, lessee, trustee, receiver, or otherwise, whether under a franchise, charter, license, articles of association, or otherwise, any plant or equipment, or any part thereof, directly or indirectly for public use, for the transportation of passengers or freight, or the conveyance or transmission of telecommunications messages, or the furnishing of facilities for the transmission of intelligence by electricity by land or water or air within the State, or between points within the State, or for the production, conveyance, transmission, delivery, or furnishing of light . . . water, gas, or oil, . . .

HRS § 269-1 (emphasis added).

The Hawaii Supreme Court clarified the definition of a public utility in Wind Power, by adopting the following test:

⁹See CA's Statement of Position at 7.

¹⁰Id.

Whether the operator of a given business or enterprise is a public utility depends on whether or not the service rendered by it is of a public character and of public consequence and concern, which is a question necessarily dependent on the facts of the particular case, and the owner or person in control of property becomes a public utility only when and to the extent that his business and property are devoted to a public use. The test is, therefore, whether or not such person holds himself out, expressly or impliedly, as engaged in the business of supplying his product or service to the public, as a class, or to any limited portion of it, as contradistinguished from holding himself out as serving or ready to serve only particular individuals.

Wind Power, 67 Haw. at 345, 686 P.2d at 834 (quoting 73B C.J.S. Public Utilities § 3).

In In re Poipu Kai Water Reclamation Corporation,¹¹ the commission found that a private wastewater company is not a public utility with respect to service that it provides to persons that control, through the Poipu Kai Association, the services of the company. Under the facts presented, the commission reasoned that the company "services itself, and not the general public or any portion of it."¹² However, the commission in Poipu Kai, concluded that the company was a public utility to the extent that it provided service to a nearby condominium project since the owners of units in the project were excluded from membership in the Poipu Kai Association, and, as such, these customers did not have the right to vote, had no control over the decisions made by the association, and did not have the same input into the rates and conditions for service as association members.

¹¹In re Poipu Kai Water Reclamation Corporation, Docket No. 6939, Decision and Order No. 11184, filed on July 22, 1991 ("Poipu Kai").

¹²See Poipu Kai at 5.

Later, in In re Hokuli'a Community Services, Inc.,¹³ the commission "determined that a nonprofit corporation that owns and operates a water system and reclamation facility for the sole use of its members that control the corporation is not a public utility since the owner-customers of the corporation have the same control over the corporation as was demonstrated in Poipu Kai."¹⁴

In this case, if the Water Association owns and operates Petitioner's proposed Water System as represented by Petitioner, the Water Association would not be a public utility under HRS § 269-1, as Petitioner represents that the Water Association would own and operate the Water System, utilize the system for the sole use of its members, and would be controlled by all of its members. According to Petitioner, the Water System "will only serve members of the Water Association" and the Water System, at no time, will supply water to the public, or any class or portion of the public.¹⁵ In addition, Petitioner represents that all members of the Water Association will have: (1) the right to vote; (2) control over the decisions made by the Water Association; and (3) the right to provide input into the rates and conditions of water service.¹⁶ Thus, as in

¹³In re Hokuli'a Community Services, Inc., Docket No. 00-0009, Decision and Order No. 17557, filed on February 22, 2000 ("Hokuli'a").

¹⁴See In re Public Utilities Commission, Docket No. 05-0238, Decision and Order No. 22282, filed on February 10, 2006 at 29 (citing Hokuli'a at 4-5).

¹⁵See Petition at 7 (emphasis added).

¹⁶Id. at 6-7.

Poipu Kai, it appears that the Water Association, in essence, would be providing service to itself as opposed to the general public, or any portion of it. Furthermore, as in Hokuli'a, it does not appear that the Water Association would be a public utility since the owner-members of the association will have the same control over water service as was demonstrated in Poipu Kai.¹⁷

Based on the particular facts presented in the Petition, the commission concludes that the Water Association would not be a public utility as defined by HRS § 269-1.¹⁸ Accordingly, the Water Association would not be subject to the commission's jurisdiction, and, thus, would not require a CPCN, pursuant to HRS § 269-7.5, to provide the proposed water service described by Petitioner. Our determination herein is consistent with Wind Power, Poipu Kai, and Hokuli'a and is based on the representations set forth in the Petition.

¹⁷The commission, however, cautions Petitioner that if one or more members of the Water Association has, retains, or is guaranteed a disproportionate or unreasonable amount of "control" over the Water System (which is not mentioned in the Petition) further analysis and development of the commission's position may be warranted.

¹⁸Our determination, as set forth in this Decision and Order, is with regard to the planned Water Association described by Petitioner. The commission expresses no opinion as to whether any other operator of the Water System, including Petitioner, would be considered a public utility under HRS Chapter 269.

III.

Orders

THE COMMISSION ORDERS:

1. The commission declares that the Water Association would not be a public utility as defined by HRS § 269-1 if it is owned, operated and controlled as represented by Petitioner in the Petition. Accordingly, under such circumstances, the Water Association would not be subject to the commission's jurisdiction, and, thus, would not require a CPCN, pursuant to HRS § 269-7.5, to provide the proposed water service described by Petitioner.

2. This docket is closed unless otherwise ordered by the commission.

DONE at Honolulu, Hawaii FEB - 1 2007.

PUBLIC UTILITIES COMMISSION
OF THE STATE OF HAWAII

By Carlito P. Caliboso
Carlito P. Caliboso, Chairperson

By John E. Cole
John E. Cole, Commissioner

APPROVED AS TO FORM:

Ji Sook Kim
Ji Sook Kim
Commission Counsel

2006-0485.ah

CERTIFICATE OF SERVICE

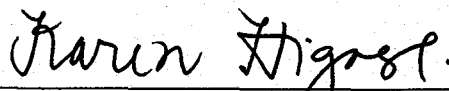
I hereby certify that I have this date served a copy of the foregoing Decision and Order No. 23239 upon the following Petitioners, by causing a copy hereof to be mailed, postage prepaid, and properly addressed to each such party.

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EXECUTIVE DIRECTOR
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DATED: FEB - 1 2007